83-5077

IN THE SUPREME COURT OF THE UNITED STATES

No. A-960

OCTOBER TERM, 1982

GERALD SMITH,
Petitioner

v.

STATE OF MISSOURI,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether under Missouri's death-sentencing statute, the Eighth and Fourteenth Amendments require a court of statewide jurisdiction to conduct a "proportionality review"; and if so, whether the "review" conducted by the Missouri Supreme Court in this cause was a constitutionally satisfactory comparative sentence review process.

II. Whether the applicable Sections of Missouri Revised Statutes Section 565.012 et seq. - which permit a jury to impose a death sentence if the crime is found to be "outrageously or wantonly vile, horrible or inhuman is forcibly vague and overbroad and cannot be applied when the defendant, as a result of mental illness, could not premeditate or formulate a specific intent to kill.

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OCTOBER TERM, 1982

GERALD SMITH, Petitioner	)	
v.	)	No. A-960
STATE OF MISSOURI, Respondent	)	

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

TO: THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Gerald Smith, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Missouri, entered in the above-entitled cause on April 26, 1983. Petitioner's Motion for Rehearing was denied on May 18, 1983.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Missouri is at present unpublished. It is Appendix A attached hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Missouri affirming Petitioner's conviction of Capital Murder and affirming and assessing his penalty at death was entered April 26, 1983. Petitioner duly filed his Motion for Rehearing which was denied by the Supreme Court on May 18, 1983, (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the

United States. The statutes involved are Sections 565.012.1, 565.012.2(7), 565.012.4, 565.012.5, 565.014 of the Revised Statutes of Missouri, 1978.

STATEMENT OF THE CASE

Petitioner, Gerald Smith, was convicted of Capital Murder under Missouri law in a jury trial on June 4, 1981. After proceeding through a separate sentencing phase mandated by Missouri law, the jury assessed his punishment at death. On direct appeal before the Missouri Supreme Court, Petitioner's conviction and sentence of death was affirmed. The victim, a 20 year old female, following an argument with the Petitioner, was struck about the head with an iron bar after being chased by the Petitioner for a distance of approximately two blocks. Although the victim was struck more than once, any one of the blows could have caused death or unconsciousness. The Petitioner confessed to the killing.

A psychological examination of the Petitioner revealed that he suffered from a mental disorder at the time of the offense and throughout the proceedings of his trial. The examining psychiatrist and psychologist diagnosed Petitioner as suffering from a borderline personality disorder, characterized by an inability to plan or control his actions and spontaneous losses of temper. This disability would substantially impair Petitioner's ability to premeditate this killing and would negate a claim that he had the specific intent to kill the victim. Such a disorder is consistent and supported by Petitioner's writing a letter to the local newspaper in essence confessing to the crime and daring the readers and the courts to punish him by death.

Under the Missouri sentencing statute (Section 565.012 RSMo. 1978), the jury is instructed in regard to any statutory

aggravating or mitigating circumstances that are supported by the evidence. In order to allow the imposition of the death penalty, the jury must find that at least one of the statutory aggravating circumstances was present. In this case, the jury was instructed and found that "the offense was outrageously or wantonly vile, horrible or inhuman in that involved torture, or depravity of mind."

Although the jury concluded that the aggravating circumstance of torture was present, there was substantial evidence that the victim's death was almost instantaneous and the fact that the victim was chased by Petitioner before the murder can scarcely be labeled as "torture" under common construction of the word.

Missouri statutes require appellate review of death sentences by the Missouri Supreme Court to review the evidence supporting the finding of the aggravating circumstances and the proportionality of the sentence to the circumstances of the crime. Despite these statutory guidelines, the Missouri Supreme Court summarily rejected Petitioner's challenge to his death sentence in a manner that, in effect, merely rubber-stamped the jury's verdict. In particular, the court failed to compare the sentence imposed in this case with those imposed in other recent capital murder cases in Missouri. The court failed to cite any other capital cases it deemed to be similar to this case.

REASONS FOR GRANTING THE WRIT

It is increasingly apparent that Missouri's statutory aggravating circumstance enumerated at 565.012.2(7) has become the catch-all for all murders the prosecutor deems fit to punish as capital crimes. Of the twenty-four people on Missouri's death row, nine have been sentenced to death as a result of the

ambiguous and unrestricted findings a jury is permitted to make under such a charge. Although most other jurisdictions have acted to tailor their statute or define the terminology contained therein, Missouri has refused to do so. Petitioner and others similarly situated will forfeit their lives as a result of the roving commission granted to the jury and compelling them to apply their findings without restriction to an ambiguous jumble of synonyms.

If this Court fails to intervene, Missouri will continue to randomly select those who are to die with no direction other than the most minimal restrictions contained within this aggravating circumstance. The substantial number and percentage of inmates who now populate death row as a result of the jury's finding that the crime passes muster under this clause demonstrates the need for a final resolution of the Missouri Supreme Court misapplication of this Court's holdings in Gregg v. Georgia, 428 U.S. 153 (1976) and Godfrey v. Georgia, 446 U.S. 420 (1980).

The Missouri Supreme Court has also in this case, and others, failed to conduct any reliable or reviewable tests of proportionality. Although Missouri's statutes offer direction to the court they have declined to follow those directions with any specificity. There is no way under the cursory, rubber-stamp review adopted by that court to insure to this Petitioner, society, or others condemned to death, that their sentence will not be disproportionately excessive. The direction of this Court is needed to reaffirm the constitutional necessity for such a review and the requirements of this review. Without direction, the review which is both required by Missouri's Statutory scheme and necessary to guarantee the constitutional application of its capital statutes will remain a hollow commitment to the principles established in this Court's opinions.

ARGUMENT

I.

Missouri statutes governing appellate review (Section 565.014.3 RSMo. 1978) of a death sentence mandates the Supreme Court of the State to determine:

> (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors; and,
>
> (2) whether the evidence supports the jury or judge's finding of a statutory aggravating circumstance as enumerated in Section 565.012; and,
>
> (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The extent of the proportionality review required by subparagraph 3 of 565.014.3 in this cause consisted of an "apparent" review of the twenty-two capital cases in which death was imposed. As pointed out in the concurring opinion of Justice Seiler, no other capital cases were cited or distinguished.

> All an observer learns from this is that to the values of the court there is nothing wrong with the death sentence here. No similar case or cases are pointed out or relied upon. Nothing is said as to why this death sentence is not disproportionate to the penalty imposed in similar cases. What is lacking is a demonstration that similar cases are not punished in Missouri less severely than the offense before us.
>
> No information is given as to how this death sentence compares with the values of the community as reflected by the verdicts of juries in similar cases. Juries selected from the community determine the sentence in these capital murder cases. It is proportionality as to what juries do with similar cases which the statute calls on us to evaluate. This, as I have attempted to illustrate on earlier occasions, we are failing to do. I do not approve of this, but under compulsion of State v. LaRette, supra, I concur in the affirmance of judgment. (Concurring Opinion of Seiler, J., p. 1, 2).

This Court will soon hear oral arguments in Pulley v. Harris, cert granted, 51 U.S.L.W. 1144 (U.S. March 22, 1983) (No. 82-1095), which touch on nearly identical areas of concern. In

that case, the Court of Appeals of the Ninth Circuit vacated a sentence of death because the California Supreme Court refused to conduct any proportionality review as required by earlier state court decisions and endorsed by the decisions of this Court. Harris v. Pulley, 692 F.2d 1189, 1196-97 (9th Cir. 1982). See also Collins v. Lockhart, No. 82-1769 F.2d 1983 (8th Cir. 1983). When this Court approved the Georgia, Florida, and Texas capital sentencing statutes on their faces, Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976), it did so on the assumption that the statute at issue, as interpreted by the highest courts of the states, would guarantee against the arbitrary and capricious infliction of the death penalty which had been condemned in Furman v. Georgia, 408 U.S. 238 (1972).

This Court has placed particular reliance on the procedures for appellate review, Gregg v. Georgia, supra, 428 U.S. at 166-168, 204-06 (Op. of Stewart, Powell and Stevens, JJ.); at 222-24 (White and Rehnquist, JJ. and Berger, C.J. concurring), viewing it is an effective means by which the state would insure that the death penalty would be applied in a fair, rational, consistent, and evenhanded manner, Proffitt v. Florida, supra, 428 U.S. at 259-60; Jurek v. Texas, supra, 428 U.S. at 276; see also Gardner v. Florida, 430 U.S. 349, 361 (1977), so that similar cases would reach similar results, Gregg v. Georgia, supra, 428 U.S. at 198, 208 (Op. of Stewart, Powell and Stevens, JJ.); Id. at 223 (White, J. concurring); Proffitt v. Florida, supra, 428 U.S. at 251, 253, 258 (Op. of Stewart, Powell and Stevens, JJ.); Jurek v. Texas, supra, 428 U.S. at 270 (Op. of Stewart, Powell and Stevens, JJ.); Id. at 279 (White and Rehnquist, JJ. and Berger, C.J. concurring); and there would be a meaningful basis for

distinguishing the few cases in which {the death penalty} is imposed from the many cases in which it is not." Gregg v. Georgia, supra, 428 U.S. at 198, quoting from Furman v. Georgia, supra, 408 U.S. at 313 (White, J. concurring); Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (Op. Stewart, Blackmun, Powell, Stevens, JJ.).

A key feature of the Florida, Georgia, and Texas death sentencing procedures then sustained was that each provided "a prompt judicial review of the {sentencing}...decision in a court with state-wide jurisdiction {as} a means to promote the evenhanded, rational and consistent imposition of death sentences under law." Jurek v. Texas, 428 U.S. 262, 276 (plurality opinion). The functions of this appellate review are "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," Gregg v. Georgia, 428 U.S. 153, 204 (plurality opinion), and "to insure that {death sentences} are consistent with other sentences imposed in similar circumstances." Proffitt v. Florida, 428 U.S. 242, 253 (plurality opinion). The Court explicitly noted that the Georgia statute (identical to the Missouri Statutory scheme) required "proportionality review" (Gregg v. Georgia, supra, 428 U.S. at 206) by commanding the Georgia Supreme Court to determine "whether the {death} sentence {in each case} is disproportionate compared to those sentences imposed in similar cases." (Id. at 198) and quoted approvingly from the Florida Supreme Court's description of the function of its sentencing review "to {guarantee} that the {aggravating and mitigating} reasons presented in one case will reach a similar result to that reached under similar circumstances in another case." (Proffitt v. Florida, supra, 428 U.S. at 251, quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)).

By contrast, this Court struck down the North Carolina statute in Woodson v. North Carolina, 428 U.S. 280 (1976) observing that there is "no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of (the death sentencing) power through a review of death sentences." Id. at 303. The footnote to this sentence cross-references Gregg's description of the Georgia proportionality review procedure, Id. at 303, n. 38 and addresses "Furman's basic requirement" as a procedure that replaced "arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Id. (emphasis added).

This Court's decision in Furman v. Georgia, supra, as well as this Court's subsequent decisions, makes clear that the constitutionality of the state's death-sentencing procedure relies upon satisfying certain basic requirements including safeguards to minimize the risk of arbitrary or capricious decisions and to insure evenhanded and consistent sentencing in all capital cases. Gardner v. Florida, supra, 430 U.S. at 361 (plurality opinion); Jurek v. Texas, supra 428 U.S. at 276 (plurality opinion); Proffit v. Florida, supra, 428 U.S. at 253 (plurality opinion). See also Furman v. Georgia, 408 U.S. 238, 398-99 (1972) (Berger, C.J. dissenting). The sentencing jury in the State of Missouri has considerable discretion in determining whether or not to impose the sentence of death. While it is true that Missouri juries cannot impose such a sentence unless they make a specific finding that one or more of the statutorily defined aggravating circumstances are present (565.012 RSMo. 1978) such a fin ing does not compel imposition of the death penalty. Even in Missouri cases where the statutorily

aggravating circumstances are present, the jury retains discretion not to impose a death sentence for any reason it chooses, or for no reason at all. (565.008 RSMo. 1978). Endowing juries with such discretion in capital cases poses a very real danger that inconsistent sentences may result. Different defendants whose background in crimes are factually indistinguishable may receive very different sentences from their respective juries - - a possibility which, theoretically, does not exist under all capital punishment statutes, e.g. Texas. For this reason, the Missouri legislature (as did the Georgia enacting body) provided a further safeguard, "proportionality review":

> In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, a specific jury finding as to the circumstances of the crime or the character of the defendant. Moreover, to guard against a situation comparable to that presented in Furman, the Supreme Court in Georgia compares each death sentence with a sentence imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate. On their face, these procedures seemed to satisfy the concerns of Furman. No longer should there be 'no meaningful basis for distinguishing the few cases in which {the death penalty} is imposed from the many cases in which it is not.' Gregg v. Georgia, supra, 428 U.S. at 198 quoting from Furman v. Georgia, 408 U.S. at 313 (White, J. concurring).

Lack of such a comparative sentencing review procedure by an appellate court of statewide jurisdiction contributed to this Court's determination that the death sentencing procedures under review in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), were constitutionally deficient. See 428 U.S. at 302-303, 334-336.

These procedural safeguards are built into a constitutional statute because "...{t}he state must administer its capital-sentencing procedures with an even hand {citation omitted}, {and thus} it is important that the record on appeal disclose to the

reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia." Gardner v. Florida, 430 U.S. 349, 361 (1977). The legislature of Missouri was not unmindful of the constitutional requirements as set out in Furman and Gardner and they attempted to establish sufficient safeguards to insure the defendant and society that a sentence of death was appropriate by requiring the Supreme Court of Missouri to "include in its decision a reference to those similar cases which it took into consideration." (565.014.5).

To facilitate this review, the legislature specifically authorized the hiring of an assistant to the Supreme Court to "accumulate the records of all capital cases in which sentence was imposed after May 26, 1977, or such earlier date as the court may deem appropriate." 565.014.6 RSMo. 1977. The information compiled by that special assistant never appears in any of the opinions of the Missouri Supreme Court and is noticeably lacking from the opinion in this cause. Presuming the data exists, one may conclude from this omission, that the court failed to use the data to construct the required constitutional proportionality review.

As indicated, the Missouri Statutory Scheme requires a comparison of defendant's case to "similar cases" considering both the "nature of the crime and the defendant." Thus, in any particular appeal, a pool of "similar cases" will be drawn to compare the defendant and the facts of the case.

Due to generalized nature of review and its inherent

deficiencies, the Supreme Court has denied to this Petitioner, and others so situated, an opportunity to know what cases that court deemed to be "similar". Of course, determining the specific criteria on the basis of which a reviewing court should select other cases as "similar" may be a complicated question. Nonetheless, it remains essential that the reviewing court conduct a sufficiently thorough search for other cases satisfying the comparability criteria being employed to preserve the viability of the ultimate objective of the review process, insuring evenhanded sentences. See generally Baldus, Pulaski, Woodworth, and Kyle. Identifying Comparatively Excessive Sentences of Death: A Quantative Approach, 33 Standford L.Rev. 1, 22-52 (1980). Viewed from this prospective, the proper scope of a reviewing court searching for "similar" cases becomes relatively clear.

First, the reviewing court must scrutinize other cases arising from within the state. (Reinforced by this Court's prior endorsement of comparative sentence review processes by a court of "state-wide jurisdiction.") Proffitt v. Florida, supra, 428 U.S. at 260-61 (plurality opinion); Gregg v. Georgia, supra, 428 U.S. at 198, 204-06 (plurality opinion).

Second, a constitutionally satisfactory comparative sentence review requires a reviewing court to extend its search for "similar" cases to all cases that might satisfy the comparability criteria being employed regardless of the sentence imposed. Missouri, by the sheer number of the cases they reviewed (at the time there were twenty-two individuals on death row all of whom have been sentenced to death) seemingly limited their search for "similar" cases to other cases which resulted in death sentences. Such a restriction is obviously inconsistent with a notion that that Eighth Amendment condemns death sentences in cases that will

not be distinguished on any principled basis from other cases that resulted in life sentences. See Godfrey v. Georgia, supra, 446 U.S. at 433 (plurality opinion); Gregg v. Georgia, supra, 428 U.S. at 198 (plurality opinion). The review of cases other than those that result in a sentence of death was implicitly endorsed in this Court's examination of the proportionality review conducted by the Georgia Supreme Court. Zant v. Stevens, ___ U.S. ___, 33 Cr.L.R. 3195, 3200 (1983) n. 19:

> The Georgia Supreme Court conducts an independent review of the propriety of the sentence even when the defendant has not specifically raised objections at trial. See Stephens v. State, 237 Ga., at 260. In this case, the Georgia Supreme Court explained:
>
> In performing the sentence comparison required by Code Ann. Section 27-2537(c)(3), this court uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed. Id., at 262.
>
> As an appendix to the opinion it provided a list of the similar cases it had considered, as the statute requires. Id., at 263. See also Ross v. State, 233 Ga. 361, 364-367, 211 S.E.2d 356 (1974); Tucker v. State, 245 Ga. 68, 74 (1980).

Third, the review process can insure evenhanded, consistent sentencing only if the reviewing court determines the frequency with which other defendants whose cases are "similar" have received life sentences. If most of the defendants in "similar" cases are sentenced to death, imposing a death sentence in the case under review does not offend the constitutional requirement of evenhandedness. See Gregg v. Georgia, supra, 428 U.S. at 203 (plurality opinion). On the other hand, if other defendants in comparable cases receive death sentences with insufficient regularity to implement the policy objectives which prompted the capital sentencing legislation, then the death sentence in the case being reviewed is constitutionally excessive. Furman v. Georgia, supra, 408 U.S. at 311-12 (White, J. concurring).

Hence, ignoring "similar" cases which resulted in life sentences limits the review process to a search for a single case in which the death sentence may serve as a "precedent" and is inconsistent with the constitutional function of comparative sentence review.

Finally, the criteria that the reviewing court employs for selecting other "similar" cases must incorporate both aggravating and mitigating features of the death sentence case under review. None of these procedures were followed by the Missouri Supreme Court. At no time did the opinion indicate that they reviewed the aggravating or mitigating circumstances presented in this case against the other cases in which death or life resulted. Mitigating circumstances should receive due consideration in the context of sentence review to insure evenhanded administration of the statute, and this Court has repeatedly affirmed that sentencing decisions in capital cases must involve individualized consideration of all relevant circumstances, particularly any mitigating features. Eddings v. Oklahoma, 102 S.Ct. 869, 874-75 (1982); Lockett v. Ohio, 438 U.S. 586, 602-605 (1978) (plurality opinion).

Even if this Court were to decide in Pulley v. Harris, that proportionality review, apparently required by substantially all the states who have capital statutes, is not a federal constitutional requirement, the action of the Missouri Supreme Court in refusing to follow the statutory scheme enacted by the legislature is a violation of the Petitioner's right to due process under the Fourteenth Amendment. Where the state creates a substantial right, such as proportionality review, the arbitrary denial of that right by the state is a federal due process violation even if the right itself is not federally guaranteed. In Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), the

Petitioner's sentence had been affirmed by a state appellate court even though the statute, under which a sentencing jury was instructed to impose a mandatory minimum sentence had been held unconstitutional by the state courts. This Court found a denial of due process:

> It is argued that all that is involved in this case is a denial of a procedural right of exclusively state concern. Where, however, a state has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of his statutory discretion, {citation} and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state. (citations).

In Missouri, as in Georgia, this Court is once again faced with the inevitable conclusion "that appellate courts are incapable of guaranteeing the kind of objectivity and the evenhandedness that this {court} contemplated and hoped for in Gregg." Godfrey v. Georgia, supra, 446 U.S. at 439 (concurring opinion Marshall and Brennan, JJ.).

II.

The Supreme Court of Missouri, by refusing to clarify or limit the construction and application to be given to 565.012.2(7) and by misapplying the holding in Gregg v. Georgia, 428 U.S. 153 (1976), has obviated that decision's constitutional mandate that the sentencer's discretion, in capital cases, be "directed" and "limited". This Court on three occasions has examined statutory aggravating circumstances adopted by different states in response to the requirement "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared,

that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," Gregg v. Georgia, supra, 428 U.S. at 189 (plurality opinion of Stewart, Powell and Stevens, JJ.).

In Gregg v. Georgia, the court reviewed in passing (the court expressly noted that "in light of the limited grant of certiorari," it would "review the 'vagueness' and 'overbreadth' of the statutory aggravating circumstances only to consider whether their imprecision renders this capital-sentencing system invalid under the Eighth and Fourteenth Amendments." Gregg v. Georgia, supra, 428 U.S. at 109 n. 51.) a Georgia statutory aggravating circumstance quite similar to subsection .2(7) of the Missouri capital statute, which identifies as aggravated those murders characterized by "torture, depravity of mind or an aggravated battery." Noting that "it is...arguable that any murder involves depravity of mind or an aggravated battery," Gregg v. Georgia, supra, 428 U.S. at 201, the court nevertheless found that the only case in which the Georgia Supreme Court had in fact upheld the death sentence based solely on this aggravating circumstance was a "horrifying torture-murder," Id. In that light, the court concluded that "there is no reason to assume that the Supreme Court of Georgia will adopt an open-ended construction," id., in violation of the Eighth and Fourteenth Amendments.

The court's second review of aggravating circumstances came in Proffitt v. Florida, 428 U.S. 242 (1976) in which a vagueness and overbreadth challenge was asserted against Florida's equivalent aggravating circumstance (the capital felony was especially heinous, atrocious or cruel). The court in Proffitt, guided by the principal that this "provision must be considered as {it has} been construed by the Supreme Court of Florida,"

Proffitt v. Florida, supra, 428 U.S. at 255, observed that Florida by judicial construction had in fact limited the circumstance to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" Id. The court declined to "say that the provision, as so construed, provides inadequate guidance," Id. at 256, under Eighth Amendment standards.

The Supreme Court's third encounter with the statutory aggravating circumstance in a capital case came in Godfrey v. Georgia, 446 U.S. 420, (1980), in which the Petitioner challenged the application to his case of the same aggravating circumstance reviewed briefly in Gregg, a circumstance almost identical to the statutory provision before the Court in the present case. The court in Godfrey acknowledged that:

> {t}here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman.'

Godfrey v. Georgia, supra, 64 L.Ed.2d at 406. The Court thereby recognized that in the absence of something more to guide the jury than the opaque language of b(7), the statute could not stand. Although the court found that narrowing criteria "had been laid out by {the Georgia Supreme Court} in Harris {v. State, 237 Ga. 718, 230 S.E.2d 1 (1976)} and Blake {v. State, 239 Ga. 392, 236 S.E.2d 637 (1977)} cases," it concluded that the Georgia Supreme Court had not applied its own restrictive construction of b(7) in Godfrey's case and therefore vacated his death sentence. (Notably the crucial limiting criteria in the Blake and Harris cases which alone save the Georgia statute as construed, rely heavily upon the final phrase of b(7)-"aggravated battery to the victim." That phrase is altogether absent from the Missouri statute in issue here.)

Similar narrowing and limiting constructions have characterized the approach of other state courts. For example the State of Alabama in Jacobs v. State, 361 So.2d 607, 633 (Ala. Crim. App. 1977), aff'd 361 So.2d 640 (1978); the State of Nebraska, in State v. Rust, 197 Neb. 528, 250 N.W.2d 867, 881 (1977); and the State of North Carolina in State v. Goodman, 257 S.E.2d 569, 585 (1979) have all adopted constructions limiting their equivalent statutory aggravating circumstances to "conscienceless or pitiless crime{s} which {are} unnecessarily torturous to the victim." The State of Virginia and the State of Arizona have engaged in simlar attempts to limit the sweep of their statutes. Smith v. Commonwealth, 248 S.E.2d 135, 149 (1978) and State v. Madsen, 609 P.2d 1046 (1980). The Missouri Supreme Court's refusal to limit or direct the construction to be given subsection .2(7) allows a jury to again speculate as to the meaning and construction to be given to that phrase without guidance from the court.

The Louisiana Supreme Court, faced with the inclusion of equivalent language as a circumstance of the substantive criminal offense of capital murder under a prior statute went further than its sisters states, holding that "the potential for abuse in making heinousness, atrociousness, or cruelty an element of the offense is both readily apparent and virtually unlimited...{T}hese terms are too vague to serve as constitutionally adequate elements...{and therefore} offen{d} the state constitutional guarantees of due process and a fair trial." State v. Payton, 361 So.2d 866, 871 (1978); see also State v. Culberth. The first Appellate District Court of Appeals of California has reached a similar conclusion concerning a California statutory "special circumstance" which appears plainly

to have incorporated into its statutory language the limiting construction placed by the Florida Supreme Court on its similar statute. (Cal. Penal Code Section 190.2(a)(14) - the jury may consider as a special circumstance that "the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity, as utilized in this Section, the phrase exceptionally heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless or pitiless crime which is unnecessarily torturous to the victim." People v. Superior Court, 105 Cal. App.3rd 365, 164 Cal. Rptr. 210. In sum, both this court and the appellate courts of a significant number of states have recognized the inherent vagueness and overbreadth of statutory aggravating circumstances such as Missouri's subsection .2(7) unless those statutes have been carefully limited by judicial construction. The Missouri Supreme Court, however, has expressly declined either "to tailor...its law" or "to define the crimes for which death may be the sentence in a way that obviates 'standardless sentencing discretion.'" Godfrey v. Georgia, supra, 64 L.Ed.2d at 406. Instead, the Missouri Supreme Court erroneously concluded from the discussion in Gregg that its own statutory aggravating circumstance is not "so wanting in precision that it renders the capital sentencing procedure capable of arbitrary and capricious decision." Westfall v. Mason, 594 S.W.2d 908, 917, and has confidently asserted:

> We see no reason to find that our almost identical statutory provision violates the Fourteenth Amendment particularly when the statute and its application is subject to mandatory review by the Missouri Supreme Court in all capital cases. Id.

That court continues to adhere to the mistaken belief that this Court's decision in Gregg mysteriously sounded the death knell on constitutional challenges to the validity of the subject aggravating circumstance. Twice since Godfrey this Court has

reaffirmed its finding that almost identical aggravating circumstances were constitutionally overbroad and vague. Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 7 n. 4 and Zant v. Stephens, __ U.S. __ 33 Cr.L. 3195, 3196, 3199 n. 16 (1982): (quoting from Arnold v. State, 224 S.E.2d 386 (1976))

> This Court's conclusion in Godfrey was....that the....aggravating circumstance...was 'too vague and nonspecific to be applied evenhandedly by a jury.'

The necessity for rational, evenhanded, and consistent sentencing standards for the jury cannot be corrected by the Court's reliance upon its appellate authority to correct a misapplication of subsection .2(7) and is nonetheless beside the point, for Godfrey clearly insists that it is "the sentencer's discretion" that must be channeled "by 'clear and objective standards' that provide 'specific and detailed guidance'" to the trial jury. Godfrey v. Georgia, supra, 64 L.Ed.2d at 406.

The inherent constitutional deficiencies of subsection .2(7) are not remedied by the Missouri Supreme Court's promise of corrective appellate intervention, if as seems certain, Missouri trial juries impose arbitrary death sentences under this subsection because of the absence of legislative or judicial guidance.

The Supreme Court of the United States has consistently condemned statutes which "licensed the jury to create its own standard in each case." Herndon v. Lowry, 301 U.S. 242, 263 (1937); e.g. United States v. L. Cohen Grocery Company, 255 U.S. 81 (1921); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Cox v. Louisiana, 379 U.S. 559 (1965); Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Coats v. City of Cincinnati, 402 U.S. 611 (1971); Papachristou v. City of Jacksonville, 405 U.S. 159 (1972); Grayned v. City of Rockford, 408 U.S. 104 (1972); Brodrick v.

Oklahoma, 413 U.S. 601 (1973); Smith v. Goguen, 415 U.S. 566 (1974). "A vague law impermissibly delegates basic policy matters to policemen, judges, and jurys for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminating application." Grayned v. City of Rockford, supra, 408 U.S. at 108-09. It is that very danger, intensified in a capital case because of the Eighth Amendment's proscription against arbitrary capital sentences, which the Missouri statute requires Petitioner and other capital defendants to endure.

Moreover the state's attempted application of subsection .2(7) to the facts of these cases is sufficient to demonstrate that, without legislative or judicial guidance, the aggravating circumstance will inevitably be abused. There was no evidence that would indicate that the victim was conscious after the first blow was struck and there was ample evidence presented by the defense to establish that any "depravity of mind" was the result of a mental illness that according to all the psychiatrists who testified at trial negated the defendant's ability to formulate any specific intent to kill. Under such circumstances the death penalty "'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Edmund v. Florida, ___ U.S. ___, 73 L.Ed.2d. 1140, 1552 (1982), quoting from Coker v. Georgia, 433 U.S. 584, 592 (1977). If it is true that "capital punishment can serve only as a deterrent only when murder is the result of premeditation and deliberation," Fisher v. United States, 328 U.S. 463 (1946) (Frankfurter, J. dissenting) it is therefore also true that a defendant who because of mental illness is unable to formulate an intent to kill or premeditate a killing does "not reflect 'a consciousness materially more depraved than that of any person

guilty of murder." Edmund v. Florida, supra, 73 L.Ed.2d at 1154. The application of .2(7) transforms Missouri's statutory aggravating circumstance into an omnium gatherum, a circus tent which will cover any murder and seeks to drag the law back to where it was before Furman v. Georgia. Both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment prohibit that result and require a declaration that Missouri Revised Statute 565.012.2(7) is vague and overbroad on its face.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD H. SINDEL
15A N. Meramec, Suite 200
Clayton, Missouri 63105
314/721-6040

Counsel for Petitioner

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 15th day of July, 1983, to John Ashcroft, Attorney General, Supreme Court Bldg., P.O. Box 899, Jefferson City, Missouri, 65101.

RICHARD H. SINDEL

Subscribed and sworn to this 15 day of July, 1983.

NOTARY PUBLIC

My Commission Expires:

LINDA S. GRIFFARD
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES APRIL 10, 1986
ST. LOUIS COUNTY

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GERALD SMITH, Petitioner	)	
v.	)	No. 83-5077
STATE OF MISSOURI, Respondent	)	

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED ON PETITION FOR WRIT OF CERTIORARI
IN FORMA PAUPERIS

I, Gerald Smith, being first duly sworn, depose and say that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed on the attached Petition for Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress; and that I have previously filed motions to proceed in forma pauperis in Missouri State Courts and leave to proceed was granted by every court that has entertained said motions.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

ANSWER:

10

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

ANSWER:

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

ANSWER:

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

ANSWER:

5. List the persons who you are dependent upon for your support and state your relationship to those persons.

ANSWER:

I understand that a false statement or answer to any

question in this Affidavit will subject me to penalties for perjury.

GERALD SMITH, Petitioner

STATE OF MISSOURI)
) ss
COUNTY OF COLE)

Subscribed and sworn to before me this ___ day of AUG 2 1983, 1983.

NOTARY PUBLIC

JACK JONES
NOTARY PUBLIC STATE OF MISSOURI
My Commission Expires:
MY COMMISSION EXPIRES JAN 25 1987

APPENDIX A

Supreme Court of Missouri

en banc

STATE OF MISSOURI,

Respondent,

vs.

GERALD SMITH,

Appellant.

No. 63338

DUPLICATE
OF FILING ON
APR 26 1983
IN OFFICE OF
CLERK SUPREME COURT

APPEAL FROM THE CIRCUIT COURT CITY OF ST. LOUIS
The Honorable Carl R. Gaertner, Judge

Defendant appeals from conviction by jury of capital murder, § 565.001, RSMo 1978,[1] and a sentence of death. Direct appeal to this Court lies for consideration of the punishment assessed, as well as errors alleged on appeal. Section 565.014; Art. V, § 3, Mo. Const. (1945, as amended 1982).

As error defendant asserts: (1) unconstitutional discrimination in the grand jury selection process; (2) improper overruling of his challenge for cause of two veniremen; (3) improper refusal to allow his attorney to inquire of veniremen whether any believed that a death sentence, if assessed, would be carried out, (4) improper refusal to instruct jury that in order to impose death penalty, they must find aggravating circumstances were not outweighed by mitigating circumstances beyond a reasonable doubt, (5) improper instruction of jury on defense of mental disease or defect; (6) facial invalidity of the death penalty statute; (7) impermissible vagueness of applicable statutory aggravating circumstance and insufficiency of evidence to support imposition of death penalty and (8) excessiveness and disproportionateness of death penalty, considering the crime and the defendant.

---

[1]Unless otherwise indicated, statutory references are to RSMo 1978.

From the substantial evidence adduced supportive of the verdict, the jury could reasonably have found the following: At approximately 8:00 p.m. on September 8, 1980, defendant and Dana Osia, a girl he had known about four years and had been dating for a week, went driving in Dana's car. After an hour or so, defendant announced his intention to visit a person whom he said was his cousin. Defendant told Dana he was going to hurt this person because she had once given him "the clap." At approximately 9:30 p.m., defendant and Dana drove to the home of Karen Roberts, where defendant invited Karen to take a ride. Initially she refused, but defendant persuaded her to go. After driving about for another hour or so, the three stopped near defendant's house and talked for awhile. During the conversation, defendant asked Dana four times to go home, and Dana finally agreed. Although Dana offered to drive Karen home, Karen was persuaded to stay by defendant, and Dana left alone.

Sometime after Dana's departure, defendant left his house with Karen Roberts to walk her home. According to defendant's subsequent confession, during the walk they argued as to whether she had given him venereal disease. At one point, Karen cursed him and defendant pushed her to the ground.
When she got up, Karen was holding a heavy metal bar which she swung at the defendant. Defendant blocked the blow and jerked the bar away; when Karen started to run, defendant gave chase. Carrying the metal bar, defendant chased Karen Roberts across the street, north for half a block, east for half a block to some railroad tracks, north along the tracks for a full block and across another street, where he finally caught her. There, defendant bludgeoned Karen to death with the metal bar. An autopsy on the body of Karen Roberts revealed massive head injuries. The back of her skull was caved in; she suffered six head lacerations, skull fractures "too numerous to count," and multiple contusions and bruises of the brain beneath the skull. These injuries were consistent with multiple blows, inflicted with the heavy iron bar identified as the

murder weapon. Any one of the blows could have rendered Karen unconscious or caused her death. Karen also suffered abrasions on her face and contusions of the shoulder, arm, hip and thigh. On a scale of "one to ten," an expert witness rated the seriousness of Karen's injuries at "eight."

Dana next saw defendant on the evening of September 9, 1980, when she, defendant and defendant's brother, Eugene, went driving. At one point, Eugene left the car to go into a liquor store, and defendant told Dana he had killed the girl they picked up the night before, which was why he had wanted her to leave. When Dana did not believe he had committed a murder, defendant showed her a newspaper story about the killing. Nine days later, defendant was arrested. After receiving Miranda warnings and executing a waiver, defendant initially denied the murder but later admitted, "I killed the bitch" and gave a detailed statement of the events described above. Defendant also accompanied police officers to the murder scene, where he assisted in locating and identifying the iron bar he used to kill Karen Roberts. The bar was approximately 18 1/2 inches long and weighed about eight pounds. Defendant was charged with capital murder.

On January 30, 1981, four months before trial, state's witness Dana Osia received the following letter addressed to her but unsigned and written on a paper bag:

> Dana you are as good as dead if you show in Court on my partner Jerry Smith. You might just die anyway unless you tell them you was lying in Court.

The defense stipulated this letter was written by defendant. On March 14, 1981, another letter handwritten by defendant was received by a St. Louis newspaper, the St. Louis Globe-Democrat:

> You people wrote the story on me back in September all wrong. So I am giving you the real story.
> I Gerald Smith killed Karen Roberts. I have been looking for her for 4 months so I could kill her. On September the 8 1980 I finally got my chance to kill her and I done just that. I had a gun on me at the time but I thought shooting her would be to damn good for her. I wanted her to feel some pain so I beat her little lousy head in. If she were living now I would do it all

over to her again. She gave me a dose of the clap back in April 1980, and because of that my feeancee Joyce Dodson left me over it. I planned on killing her ever since.

Gerald Smith
the cold blooded killer

Defendant did not testify but admitted through counsel that he killed Karen Roberts. He called two witnesses, a psychiatrist and psychologist, to advance a theory of diminished capacity and assertion that the act at most constituted second degree murder. After considering the evidence, arguments and instructions, the jury found defendant guilty of capital murder. At the punishment phase of the trial, the state introduced no additional evidence, but the defense called a City Jail chaplain, defendant's mother, and his former girl friend to argue against the death penalty. The jury returned a sentence of death, which was imposed by the court.

Defendant is a white male with an eighth grade education. At the time of the murder he was 21 years old.

I.

Defendant contends the trial court erred in overruling the motion to quash his indictment because the process of grand jury selection in the City of St. Louis denied him equal protection of the laws and his right to a grand jury representing a fair cross-section of the community. Defendant was indicted by the August, 1980 term of the Grand Jury, and his motion to quash was consolidated with 140 others containing the same allegations regarding the same grand jury. The contention raised here was briefed, argued and overruled in State v. Baker, 636 S.W.2d 902, 907-10 (Mo. banc 1982) and State v. Payne, 639 S.W.2d 597, 598-99 (Mo. banc 1982), appeals involving other consolidated defendants. Defendant concedes our holding in Payne controls here, and the contention is denied.

II.

It is next asserted the court erred in overruling defendant's challenges for cause of two veniremen, neither of whom served on the jury.

The principles governing jury selection in this state are well established. Among others is the right of the criminal accused to fair and impartial jurors who will follow the law. To protect the defendant's right to a jury free from objectively demonstrated and subjectively sensed partiality, he must be afforded a full panel of qualified veniremen from which to make his allotted peremptory challenges, State v. Engleman, 634 S.W.2d 466, 471 (Mo. 1982); State v. Thompson, 541 S.W.2d 16, 17 (Mo. App. 1976). While trial court refusal to sustain a valid challenge for cause constitutes reversible error, State v. Engleman, 634, S.W.2d at 471, it is well established that the trial court has wide discretion in determining the qualifications of a venireman, and its decision thereon will not be disturbed absent a clear abuse of discretion and real probability of injury to the complaining party. State v. Betts, ____ S.W.2d ____ (Mo. banc 1982). A clear line cannot be drawn for all cases as to when a challenge for cause should be sustained; there will be instances in which an appellate court might have done differently but cannot say there was an abuse of discretion; each case must be judged on its particular facts; a determination by the trial judge of the qualifications of a prospective juror necessarily involves a judgment based on observation of his demeanor and, considering that observation, an evaluation and interpretation of the answers as they relate to whether the venireman would be fair and impartial if chosen as a juror. State v. Cuckovich, 485 S.W.2d 16, 22-23, (Mo. banc 1972). Because the trial judge is better positioned to make that determination than are we from the cold record, doubts as to the trial court's findings will be resolved in its favor. State v. Engleman, 634 S.W.2d at 472.

Defendant contends the court erred in denying his motion to strike for cause Venireman Moss, because the testimony showed "he would likely give greater weight to the testimony of a police officer purely by virtue of his status as a police officer." Voir dire of Mr. Moss included the following:

MR. BAUER [PROSECUTOR]: . . . [Y]ou may recall as I read the list of witnesses, quite a few of them were police officers. And everyone of us probably at sometime in our lives has some experience with police officers; whether it's receiving a speeding ticket or being helped out in a time of need or whatever. The question is that when these officers take the stand they are like any other witness. Do any of you feel that if you listen to the testimony of a police officer, for whatever reason, you feel that you would give it more weight or credibility or less weight and credibility than any other witness? Or would you be able to treat their credibility and the weight of their testimony as you would any other witness? Any of you have any problem?

VENIREMAN MOSS: I think I might lean more towards a police officer's testimony.

MR. BAUER: All right. You understand that the police officers are like any other witness, basically?

VENIREMAN MOSS: Well my brother is a police officer.

MR. BAUER: You think that that would have an effect on you?

VENIREMAN MOSS: It's hard to say, it might. I don't know.

MR. BAUER: The duty of a jury, as I mentioned, is to listen to the evidence and return a verdict based on that evidence. I could probably stand here for another ten hours and not get to know you as well as I would like. Unfortunately, we don't have that kind of time. Is there anything you can think of about yourselves that you think might affect your ability to sit and listen and return a verdict in this case and be a fair juror to the defendant as well as to the State? Anybody think you would have any problems along those lines? Okay, Fine. . ..

Defendant's attorney later made the following inquiry:

MR. PUTZEL [DEFENSE COUNSEL]: . . . Mr. Moss you said what, your brother-in-law is a police officer?

VENIREMAN MOSS: No my brother is, in Virginia.

MR. PUTZEL: Your brother?

VENIREMAN MOSS: My brother is.

MR. PUTZEL: Has he ever been a police officer in this City?

VENIREMAN MOSS: No he has never lived here.

MR. PUTZEL: Do you think that the fact that your brother is a police officer would influence the way you view a police officer's testimony? You indicated earlier you thought you might tend to lean towards believing or lean toward the police officer. Can you elaborate?

VENIREMAN MOSS: Yeah. My feeling is that I don't feel the police would be lying. I'm not trying to imply some other witness might be, or bending the truth, but that's all. I don't think the fact my brother is a police officer would itself really effect [sic] me.

MR. PUTZEL: It's your general feeling, without saying other witnesses would be lying, that you would be what, less likely to be critical of a police officer's testimony or less likely --

VENIREMAN MOSS: I think I would have less doubts about the validity of his testimony.

MR. PUTZEL: Well you understand that there will probably be a fair number of police officers testifying in this case?

VENIREMAN MOSS: Um-hum.

MR. PUTZEL: Okay. Do you think, then, that that might present you with some difficulty with respect to being fair to my client, since you would start out at least giving the police officers a little bit of an edge as far as believing their testimony?

VENIREMAN MOSS: It's hard to say. Just what I said before, is that I think I would have less reason to doubt the validity of a police officer's testimony, okay? I mean, I don't see that they have anything --

MR. PUTZEL: Any motive to shade the truth?

VENIREMAN MOSS: Yeah, I think they're just doing their job.

MR. PUTZEL: Well, if in fact the police officer's testimony were damaging from my client's point of view, do you think, then, that might cause you to be unfair to him?

VENIREMAN MOSS: No, because I would have to listen to what the other people were saying. I assume there are -- I don't know if assume is the right word -- but since their, the investigations and whatever else was involved in this case, I guess I have to say I assume their testimony would be damaging to your client, all right?

MR. PUTZEL: All right. That's a safe bet, police officers are obviously engaged in the business of arresting people who commit violations of the law. Okay.

After defense counsel concluded his questions to the panel, the Court addressed Veniremen Moss:

THE COURT: Mr. Moss, there is one thing I want to get straight about some of the questions you were asked in connection with police officers.

I took it from what you said a moment ago that you have the feeling that there would be less reason for police officers to lie than perhaps some other person. But do you realize as a juror you have to make that determination as to the believability or the credibility of each and every witness who testifies depending upon the facts in this case? And would you be able to do that with regard to police officers as well, and treat them in no different fashion than any other witness from the stand-

point of making that determination?

VENIREMAN MOSS: Yeah.

THE COURT: All right.

Defense counsel's motion to strike Venireman Moss for cause was overruled.

There is ample support in this record for the trial court's finding that Venireman Moss could be a fair and impartial juror. Mr. Moss's initial statement that he "might lean more towards a police officer's testimony" raised a possibility that his brother's occupation would affect his ability to fairly evaluate police testimony. After further reflection, however, Moss stated he didn't think his brother's position would affect his judgment. Viewed in the light most favorable to the trial court's finding, the testimony as a whole indicated that in evaluating the credibility of any witness, Moss would consider the witness's motive to lie. It was Mr. Moss's expressed opinion that a policeman, as a policeman, would have less motive to lie than other possible witnesses. As a hypothetical generalization, we find no disqualifying bias in this statement. Mr. Moss clearly said he did not assume any witness would lie. When asked specifically whether damaging police testimony might cause him to be unfair to the defendant, Mr. Moss unequivocally answered "No," and said that his ultimate determination would depend on what all the witnesses had to say. In response to the court's inquiry, Mr. Moss said he would be able to determine the credibility of each witness depending on the facts of the case and treat policemen no differently than any other witness in making that determination. From this and the trial court's opportunity to view the demeanor of the witness and hear his testimony, we find no abuse of discretion by the trial court.

Although not essential to our determination, it is noteworthy that the credibility of police officers was not a significant issue in this case. Six of the twelve state witnesses were police officers, but none testified to an issue truly contested in the

case. One police witness described finding the body; another described the scene where the body was discovered; a third identified the iron bar alleged to be the murder weapon; two policemen described arresting the defendant, his waiver of rights and oral confession, and his assistance in locating the murder weapon; the sixth police witness described defendant's first admission that he killed Karen Roberts. Defendant did not contest these facts. Through counsel, he admitted killing Karen Roberts and his confession to police officers. There was no argument his confession did not occur as described or that events did not occur as confessed. Defense counsel argued the confessed facts were more consistent with a finding of diminished capacity than of capital murder. The major issue at defendant's trial was his mental state, an issue upon which police testimony shed very little light. The relevant evidence was provided by Dana Osia, defendant's own letters, the psychologist and the pyschiatrist. These facts strengthen our conviction that the trial court did not err in finding Venireman Moss qualified to serve as a fair and impartial juror.

Defendant also contends the court erred in overruling his challenge for cause of Venireman Kraft. Voir dire of Mr. Kraft included the following:

> MR. PUTZEL: Now again, all of you have indicated as you sat here so far you can consider the death penalty in a case. I want to ask this question: Do any of you think that the death penalty ought to be automatic in a case of Capital Murder; so that if some one is convicted of the crime of Capital Murder the only punishment available ought to be capital punish ment or death in the gas chamber? Do any of you feel that way?
>
> VENIREMAN KRAFT: If found guilty after listening to the testimony, I do.
>
> MR. PUTZEL: You think it should be automatic?

VENIREMAN KRAFT: (Shaking head.)

MR. PUTZEL: Would it be your statement, then, Mr. Kraft, that if you deliberated on the jury and if you found Jerry Smith guilty of Capital Murder, that you would automatically vote for the death penalty?

VENIREMAN KRAFT: Yes, sir.

MR. PUTZEL: Thank you mr. Kraft, I appreciate your honesty.

. . .

MR. BAUER: Mr. Kraft you indicated in answer to a question by Mr. Putzel concerning the death penalty, I believe you indicated, that you're in favor of the death penalty.

VENIREMAN KRAFT: Yes, sir.

MR. BAUER: All right. Do you feel that if the Court instructs you that there are two alternatives for this case; that after you listen to the evidence you will be able to consider both the death penalty and the life in prison with no probation or parole for fifty years, and make your determination considering both of them as alternatives?

VENIREMAN KRAFT: Possibly, yes.

MR. BAUER: All right. So what you're saying, then, is although you favor the death penalty you would be able to consider both alternatives?

VENIREMAN KRAFT: Yes, sir, depending on the testimony.

MR. BAUER: Depending on what you hear and you at this time have no idea what the testimony is going to be.

VENIREMAN KRAFT: Okay [illegible].

MR. BAUER: Okay fine.

THE COURT: Mr. Kraft we might as well explore that because those who are selected as jurors will take an oath to follow the law of this State. And in this case with regard to that point, the Court will undoubtedly give an instruction to the jury to the effect that you may not return a death penalty verdict, even though you have found a party guilty of Capital Murder, unless you find some aggravating circumstance; and if you do not find an aggravating circumstance then the verdict must be life in prison without possiblity of probation or parole for fifty years. Would you have any difficulty in following such an instruction, Mr. Kraft?

VENIREMAN KRAFT: No, sir. Like I say, it would depend on the testimony.

THE COURT: That's fine, that's fine. Thank you sir.

Defense counsel's motion to strike venireman Kraft for cause was denied. Defendant argues this was error because "[Mr. Kraft] said that upon a finding of guilty of capital murder he would automatically impose the death penalty," indicating he could not "follow the law and consider the full range of punishment after a finding of guilt and further deliberation on aggravating and mitigating circumstances."

The defendant has a right to jurors who will follow the law. State v. Brown, 547 S.W.2d 797, 799 (Mo. banc 1977). Section 565.012, RSMo Cum. Supp. 1982, requires the jury in a capital murder case for which the death penalty is authorized to consider both aggravating and mitigating circumstances in determining the penalty imposed. Section 565.008 mandates a sentence of life imprisonment if the jury does not recommend imposition of the death penalty. Implicit

in these statutes is a requirement that juries in cases such as this consider the appropriateness of life as well as death sentences, and a juror who would automatically vote to impose a sentence of death upon a finding of guilt regardless of circumstances may be challenged for cause. However, we find a fair reading of the record in this case supports the trial court's conclusion that venireman Kraft would follow the court's instructions and consider both penalties authorized for capital murder.

The first pertinent defense question was whether the potential jurors thought "the death penalty ought to be automatic in a case of capital murder; so that if someone is convicted of the crime of capital murder the only punishment available ought to be capital punishment or death in the gas chamber." (Emphasis added.) Venireman Kraft was then specifically asked whether he thought "[capital punishment or death in the gas chamber] should be automatic." (Emphasis added.) Directly following these two questions came the query, "[w]ould it be your statement, then, Mr. Kraft, that if you deliberated on the jury and if you found Jerry Smith guilty of Capital Murder, that you would automatically vote for the death penalty?" Reviewed in context, venireman Kraft's affirmative answer to this question does not constitute an unambiguous assertion that he would not follow the court's instructions if directed the law required consideration of life imprisonment as well as capital punishment. No alternative to capital punishment was mentioned in defense counsel's preceding questions, and it is reasonable to infer that venireman Kraft was responding in the hypothical vein established in the two previous questions. Further, the qualifications of a prospective juror are not determined conclusively by a single response but are made on the basis of the entire examination, State v. Garrett, 627 S.W.2d 635, 642 (Mo. banc 1982), and Mr. Kraft's subsequent testimony indicated he would not automatically sentence to death persons convicted

of capital murder if he were instructed to do otherwise. Upon inquiry he told the State's attorney and the court he would be able to consider both punishment alternatives. Defendant argues Mr. Kraft's answers, "[p]ossibly, yes," "[o]kay, yes," and "depending on the testimony" were equivocal, but we are not bound to adopt the interpretation defendant urges in the face of other reasonable constructions. It is reasonable to interpret "[p]ossibly, yes" as an abandonment of the equivocal in favor of a positive response and "[o]kay, yes" as an understanding of the question followed by an affirmative response. It is also reasonable to infer the statement "it would depend on the testimony," referred to the sentence Mr. Kraft would favor in a given case, not his ability to consider both punishments.

Defendant also argues that venireman Kraft's response to the inquiry of the court did not indicate willingness to consider the punishment of life imprisonment even if an aggravating circumstance was found, but only ability to follow an instruction that capital punishment could not be imposed unless an aggravating circumstance was found. Defendant cites the case of Smith v. State, 573 S.W.2d 763 (Tex. Crim. App. 1977), in which the Texas Court of Criminal Appeals said:

> [A] juror's willingness to demand of the state that it prove each question submitted pursuant to Art. 37.071 [one of which was equivalent to an aggravating circumstance] beyond a reasonable doubt is not equivalent to an assertion that the juror will consider the full range of punishment for the offense in question.

Id. at 765.

Smith v. State, supra, however, is factually distinguishable from this case. In Smith, "[t]he overall picture presented by the voir dire examination of . . . [the venireman] is one of a person holding strong convictions that death is the only punishment he could consider for a person guilty of capital murder, and that life

imprisonment is not an adequate punishment and would not be considered."[5] 573 S.W.2d at 765 (Emphasis added). Such is not the case here. In overruling defense counsel's motion to strike venireman Kraft for cause, the trial court said:

> . . . I think his response to your question [that he would automatically vote for the death penalty if he found defendant guilty of capital murder], . . . really, was because he didn't understand what the law would require of him. Once that was pointed out to him, I think he indicated he would at least give consideration . . .. I'm going to overrule the Motion to strike him.

Giving due regard to the trial court's opportunity to view the demeanor of the witness and hear his testimony, our review of the record discloses no abuse of discretion.

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5 In Smith v. State, 573 S.W.2d 763 (Tex. Crim. App. 1977), the challenged venireman explicitly stated he would not consider the punishment of life imprisonment if appellant were found guilty of capital murder:

> Q. Then, you really wouldn't consider life - you wouldn't even consider it?
>
> A. That's right.

Id. at 764. At several other points, the venireman expressed his belief that death should be the penalty for taking a life:

> . . . I feel very strongly if a person, after pushing to take somebody's life, he should - give his life.
>
> [If] a person actually took another person's life then he should . . . give his life for another person's life.
>
> I've always felt that way about it I feel that if somebody knowingly takes some[one] else's life . . . then they should be willing to forfeit theirs.

Id. at 764-65. The venireman also stated his view that death would be the only proper punishment was a firm conviction and that he could not be swayed or persuaded from that position. When asked whether he could consider a punishment of life imprisonment, he said that they are turned loose too quickly and that murderers who are given a life sentence are "back on the streets in a few years and [do] it all over again." Id. at 765.

In contrast to these earlier statements demonstrating an unwillingness to consider life imprisonment, the venireman's answers to questions asked by the court in an effort to rehabilitate him were equivocal and ambiguous. Id.

Defendant also contends the court erred in overruling his motion to strike venireman Kraft for cause, because "[Mr. Kraft said he] had a daughter who was raped at the same age at which the victim was murdered [and] . . . indicated that this would affect his ability to be impartial." The pertinent testimony was as follows:

MR. PUTZEL: Have any of you ever been the victim of an assaultive type of crime? And by that I mean armed robbery and assault where they - someone tried to hurt you physically or did hurt you physically and that you would include, among that; have you yourself or any close friends or relatives been the victims of such crimes, I would include among those, rape and sexual offenses of all sorts or sexual assaults. Are there any responses to that question?

Okay, Mr. Kraft?

VENIREMAN KRAFT: I had a daughter that was raped.

MR. PUTZEL: That's obviously a trauma that none of us would like to have to go through. I know it was for you as well as your daughter a terrible thing. Do you think because that obviously is an extremely violent, assaultive act, that your daughter's experience in that regard would affect your ability to be fair to Jerry Smith in this case? Because I will tell you that the woman who was killed in this case was a twenty year old woman, although there is no allegation of rape.

VENIREMAN KRAFT: That's all she was.

MR. PUTZEL: Do you think that would affect your ability to be fair in this case?

VENIREMAN KRAFT: I don't know, I'd have to consider it.

After this colloquy, defense counsel made no further attempt to question Mr. Kraft on the subject. At the close of voir dire, however, defense counsel addressed the following question to the panel as a whole:

> Is there anyone who at this point presumes or thinks that Jerry Smith, as he sits here is now guilty of Capital Murder and therefore cannot be fair in this case? I see no one raising their hands.

In requesting that Mr. Kraft be stricken for cause, defendant made no reference to venireman Kraft's mention of his daughter, but premised the motion solely on his alleged inability to consider the full range of punishment. Defendant failed to preserve this claim, hence the issue is reviewable only for manifest injustice under Rule 29.12. State v. Lee, 617 S.W.2d 398, 399-400 (Mo. 1981). The facts of this case do not warrant a finding of manifest injustice. Venireman Kraft did not assert he would be biased against appellant because of his past experience, but merely stated he would have to give more thought to this question before answering it. After indicating he needed to think about whether the past experience involving his daughter would affect his ability to be fair and impartial, and after being given an opportunity to reflect on whether he was capable of fairly judging the case or whether he would presume the defendant was guilty, Mr. Kraft,[6] as well as the rest of the panel, remained mute. In light of these facts, and again giving due regard to the trial court's opportunity to view the witness and hear his testimony, we do not find that manifest injustice or miscarriage of justice resulted from the trial court's failure to question venireman Kraft further or strike him for cause.

III

Defendant next contends the trial court erred in sustaining the State's objection to defense counsel's inquiry during voir dire as

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[6]Mr. Kraft did not serve on the jury and there is no evidence in the record that defendant employed a peremptory challenge to exclude him.

to whether the potential jurors believed that a death sentence, if assessed, would be carried out. Defendant argues the paucity of executions in the United States has received wide publicity and a venireman's belief that a death sentence will not be carried out could substantially affect his decision on punishment; hence, the proposed question had a legitimate purpose and should have been allowed.

The purpose of voir dire is to enable each party to participate in selection of a fair and impartial jury and to that end, wide latitude is allowed in examination of the panel. State v. Lumsden, 589 S.W.2d 226, 229 (Mo. banc 1979). During voir dire the defendant should be permitted to develop not only facts which might manifest bias and form the basis of a challenge for cause, but also such facts as might be useful to him in detecting the possibility of bias and intelligently utilizing his peremptory challenges. State v. Brown, 547 S.W.2d 797, 799 (Mo. banc 1977); State v. Thompson, 541 S.W.2d 16, 17 (Mo. App. 1976). Nevertheless, the examination of jurors as to their qualifications is conducted under the supervision of the trial court and the nature and extent of the questions counsel may ask are discretionary with that court. State v. Lumsden, 589 S.W.2d 226, 229 (Mo. banc 1979). Rulings of the trial court during voir dire will be disturbed on appeal only when the record shows an abuse of discretion, State v. Lumsden, 589 S.W.2d at 229, and a real probability of injury to the complaining party. State v. Olinghouse, 605 S.W.2d 58, 68 (Mo. banc 1980).

The pertinent portion of the voir dire proceeded as follows:

> MR. PUTZEL: How many of you believe that if you, in this case, were to find Jerry Smith guilty of Capital Murder and if you were to assess the death penalty, how many of you believe that Jerry Smith would be executed?
>
> MR. BAUER: Your Honor, I object.

THE COURT: That will be sustained.

During the subsequent discussion, the court explained its ruling:

> THE COURT: . . . The Court is not going to permit that question for the reason that it constitutes in the Court's position, a disparagement of the administration of justice, and that it is a kind of question that plants a doubt in the minds of jurors about the law being carried out in this State. And for that reason I consider it to be an improper question and it is not an appropriate question of prospective jurors, and the question is not going to be asked of future sections of the venire . . ..

Defendant cites State v. Newlon, 627 S.W.2d 606, 619-20 (Mo. banc 1982), cert. den. 103 S.Ct. 185 (1982), and argues our failure to find reversible error in the prosecutor's closing argument in that case mandates reversal here. However, Newlon does not stand for the proposition cited here by defendant. At the close of the punishment phase of the bifurcated proceeding in Newlon, also a capital murder case, the prosecutor argued without objection that a sentence of life imprisonment without possibility of parole for fifty years did not necessarily mean the defendant would serve fifty years, that the law could be changed or the sentence commuted. At least with a death sentence, the prosecutor continued, there would be some assurance the defendant would not commit any more crimes and others might be deterred from committing a robbery and taking a life just for money. Defendant contended on appeal that these remarks constituted impermissible argument of his criminal record as a reflection of his character and a basis for conviction to prevent future acts and that the trial court committed reversible error in failing sua sponte to declare a mistrial after the remarks

were made. We responded that because such evidence was available for consideration during the penalty phase and was relevant to the issue of depravity, it was a permissible subject for argument during that phase of defendant's capital murder trial, 627 S.W.2d at 619-620. Just as we ruled in Newlon that the trial court did not abuse its discretion in failing sua sponte to declare a mistrial following relevant remarks of counsel, we determine here that the trial court did not abuse its discretion in excluding defense counsel's inquiry, which at best was only remotely relevant.

In State v. Olinghouse, 605 S.W.2d 58, 69 (Mo. banc 1980), this Court held the trial court did not err in refusing to allow defense counsel to inquire of the venireman whether they knew the penalty of life imprisonment for capital murder did not include the possibility of parole for 50 years. Defendant there contended the question would have permitted him to ascertain the existence of prejudice that might cause a juror to find the defendant guilty of capital murder rather than a lesser offense for which the possibility of parole existed. Nevertheless, we concluded:

> '. . . The question of future clemency is extraneous to a proper determination of issues of guilt and punishment by the jury. It should be of no concern to them. . ..' Inasmuch as the proposed inquiry and the request for further instruction by the court related to matters 'of no concern' to the jury, the trial court did not abuse its discretion in its rulings.

605 S.W.2d at 69. Similarly in the case at bar, factors such as commutation, reversal of sentence on appeal or protracted litigation by the defendant which might delay or prevent execution of a death sentence were extraneous to a proper determination of guilt and punishment by the jury, and the court did not abuse its discretion in determining that the impropriety of jury speculation on such matters outweighed any potential benefit to the defendant. Defendant's contention is denied.

IV

Defendant next asserts submission during the penalty phase of Instructions No. 25[6] and No. 27,[7] which permitted imposition of the death penalty without a finding that beyond a reasonable doubt the mitigating circumstances in his case did not outweigh the agravating circumstances found to exist violated his constitutional rights to due process of law. Defendant concedes this claim was rejected in State v. Bolder, 635 S.W.2d 673, 683-84 (Mo. banc 1982), but argues

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[6]In accordance with MAI-CR2d 15.44, Instruction No. 25 read:

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 22, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Karen Roberts.

You may also consider

1. Whether the murder of Karen Roberts was committed while the defendant was under the influence of extreme mental or emotional disturbance.

2. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. The age of the defendant at the time of the offense.

You may also consider whether the defendant had a mental disease or defect at the time of the murder of Karen Roberts.

You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

[7]In accordance with MAI-CR2d 15.46, Instruction No. 27 read:

Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you.

our treatment of the issue in Bolder was incomplete. He cites no persuasive precedent but argues the deprivation of life which may follow capital murder proceedings mandates the same threshold of proof for establishing no preponderance of mitigating circumstances as for establishing guilt. Permitting the jury to impose the death penalty when it finds the aggravating circumstance or circumstances equal any mitigating circumstances, defendant contends, substantially and unconstitutionally compromises the intended salutary effect of the jury's required consideration of mitigating circumstances.

We have reviewed our ruling on this point in State v. Bolder, 635 S.W.2d 673, 683-84 (Mo. banc 1982), and find no infirmity. The purpose of the reasonable doubt standard is to reduce the risk of convictions and executions based on factual error. See In re Winship, 397 U.S. 358, 364 (1970). In Missouri, before a jury can consider a sentence of death, it must unanimously find beyond a reasonable doubt every fact necessary to establish guilt of a capital crime and the existence of at least one statutory aggravating circumstance, § 565.012, RSMo Cum. Supp. 1982. Once these factual thresholds are crossed, however, the issue ceases to be one of proof and becomes one of discretion: will the jury, after considering all the evidence and aggravating and mitigating circumstances relevant to the crime and the defendant, recommend a sentence of death or life without eligibility for probation or parole for fifty years. The standard mandated by the Fourteenth Amendment for proof of ultimate facts does not control such an exercise of discretion.

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court held imposition of the death penalty under the standardless capital sentencing schemes of Texas and Georgia constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, 408 U.S. at 239-40, because unguided jury discretion created a substantial risk the death penalty would be inflicted in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S.

153, 188 (opinion of Stewart, Powell and Stevens, JJ.), 220-21 (opinion of White, The Chief Justice, and Rehnquist, JJ.) (1976). As noted in Bolder 635 S.W.2d at 684, however, the United States Supreme Court later considered and upheld against the Eighth and Fourteenth Amendment attacks a statutory balancing process substantially indistinguishable, in pertinent parts, from Missouri's. Proffitt v. Florida, 428 U.S. 242 (1976). Defendant claims there are "significant differences" between the Florida statute upheld in Proffitt and Missouri law, manely that under Florida law the sentence is determined by the trial judge rather than the jury, and the judge, if he imposes a death sentence, must set forth in writing his findings as to both aggravating and mitigating circumstances. We do not find these differences significant for purposes of the cruel and unusual punishment prohibition of the Eighth Amendment as applied to the states through the Fourteenth Amendment. The Missouri and Florida statutes are alike in that:

> The directions given to judge and jury by . . . statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones[, and] . . . [a]s a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 428 U.S. at 258. The Furman requirement that sentencing discretion is guided and channeled by required examination of specific facotrs that argue for and against the death penalty, thus eliminating total arbitarinesss and capriciousness in its imposition, is satisfied in the Missouri, as well and the Florida, capital sentencing statutes.

No reason is advanced to interpret the cruel and unusual punishment provision of Art. I, Section 21, or the due process provision of Art. I, Section 10, of the Missouri Consitution differently in these respects from the United State Constitution, and we decline to do so. Defendant's point is denied.

V

Defendant next contends the death penalty violates the cruel and unusual punishment clause of the Eighth Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, as well as the due process clause of Art. I, § 10, the cruel and unusual punishment provision of Art. I, §21 and the "natural right to life" clause of Art. 1, § 2 of the Missouri Constitution. Defendant cites Furman v. Georgia, 408 U.S. 238 (1972), particularly Justice Marshall's observation that "the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society." 408 U.S. at 365-66. Our discussion in State v. Newlon, 627 S.W.2d 606, 612-13 (Mo. banc 1982), cert. den. 103 S.Ct. 185 (1982), disposes of all but the equal protection claim. Examination of that claim reveals nothing of merit. Defendant offers no any basis for sustaining his broad, unsupported conclusional argument that the law is somehow violative of his rights to equal protection. This point is denied.

VI

For his next contention defendant asserts the trial court erred in submitting instructions which excepted from the definition of "mental disease or defect" the conditions of "alcoholism without psychosis, drug abuse without psychosis or an abnormality manifested only by repeated anti-social conduct." Defendant complains there was no evidence to support these instructions and, as they compromised his diminished capacity defense, their submission violated his constitutional rights to due process of law.

At trial, defense counsel argued that a personality disorder rendered defendant incapable of the cool deliberation required for capital murder. Section 552.030.3, RSMo Cum. Supp. 1982, provides that evidence of mental disease or defect is admissible to prove the defendant did not have the required state of mind

that is an element of the offense and for the purpose of determining whether a defendant convicted of a capital offense shall be sentenced to death or life imprisonment. Section 552.010 expressly excludes from the definition of "mental disease or defect" alcoholism without psychosis, drug abuse without psychosis and abnormalities manifested only by repeated criminal or otherwise antisocial conduct.[8] In accordance with these statutes, Notes on Use 4 to MAI-CR2d 3.74 and MAI-CR2d 2.32 instruct that when mental disease or defect is submitted to a jury, the term shall be defined as follows:

> The phrase 'mental disease or defect,' as used in these instructions, means any mental abnormality, regardless of its medical label, origin or source (except alcoholism without psychosis) (except drug abuse without psychosis) (or) (except an abnormality manifested only by repeated anti-social conduct).
>
> In determining under other instructions given to you, whether the defendant had a mental disease or defect at the time of the commission of the offense charged against him and, if so, the extent and effect of it, the jury may take into consideration all of the facts, circumstances and opinions given in evidence. However, it is for the jury alone to decide this issue under the law as given to you in these instructions.

Notes on Use 2 following MAI-CR2d 2.32 specifies:

> 2. The three parenthetical matters deal with special situations, the last of which is sociopathy or, as it is sometimes known, psychopathy. See Section 552.010, RSMo. All should be omitted unless the evidence

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[8] Section 552.010 provides:

> The terms 'mental disease or defect' include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms 'mental disease or defect' do not include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy as defined in section 202.700, RSMo, nor shall anything in this chapter be construed to repeal or modify the provisions of sections 202.700 to 202.770, RSMo.

> justifies calling them to the jury's attention. If there is evidence justifying reference to any one or more of such matters, it or they should be included in the instruction.

When there is no evidence in a case of alcoholism or drug abuse without psychosis or repeated antisocial behavior, but there is evidence of mental disease or defect, this instruction serves to minimize jury confusion by omitting extraneous matters. When there is evidence of alcoholism or drug abuse without psychosis or antisocial behavior and evidence of mental disease or defect, however, the parenthetical matters in MAI-CR 2.32 serve to clarify the law for the jury by distinguishing between these conditions.

In response to questioning by defense counsel, Dana Osia testified that while she, Karen Roberts and the defendant were driving around the night of the murder, defendant drank a beer, smoked marijuana and appeared "to be high." In response to a question from defense counsel a police officer testified to hearing a statement by defendant that on the day Karen Roberts was killed he had been drinking beer and taking a "downer" called Placidyl. In his direct examination of the psychiatrist, defense counsel elicited testimony that defendant had a history of at least two suicidal episodes, one of which involved an overdose, expulsion from school for fighting, frequent drug and alcohol use and "angry attacks" at other people. The psychiatrist also testified that defendant was not suffering from any psychosis. Police testimony indicated that defendant's arrest occurred in the Alcohol Abuse unit of Compton Hills Medical Center and, defendant's mother testified, he had had a drinking problem for several years. Clearly, there was ample evidence of alcoholism and drug abuse without psychosis and of repeated antisocial conduct to justify the trial court's conclusion that the jury might benefit from the clarifying instructional phrases.

We have reviewed the pertinent jury instructions submitted during

defendant's trial.[9] The jury was told three times, by Instructions

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[9]Instruction Nos. 6, 7, 8 and 9 patterned respectively after MAI-CR2d 2.32, 15.02, 3.02 and 3.74 were submitted during the guilt phase of defendants trial:

Instruction No. 6

The phrase 'mental disease or defect,' as used in these instructions, means any mental abnormality, regardless of its medical label, origin or source except alcoholism without psychosis, drug abuse without psychosis or an abnormality manifested only by repeated anti-social conduct.

In determining under other instructions given to you, whether the defendant had a mental disease or defect at the time of the commission of the offense charged against him and, if so, the extent and effect of it, the jury may take into consideration all of the facts, circumstances and opinions given in evidence. However, it is for the jury alone to decide this issue under the law as given to you in these instructions.

Instruction No. 7

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about September 9, 1980, in the City of St. Louis, State of Missouri, the defendant caused the death of Karen Ann Roberts by striking her, and

Second, that the defendant intended to take the life of Karen Ann Roberts, and

Third, that the defendant knew that he was practically certain to cause the death of Karen Ann Roberts, and

Fourth, that the defendant considered taking the life of Karen Ann Roberts and reflected upon this matter coolly and fully before doing so, and

Fifth, that defendant is not entitled to be acquitted of the offense of capital murder by reason of Instruction No. 9,

then you will find the defendant guilty of capital murder.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

Instruction No. 8

If you do not find and believe from the evidence beyond a reasonable doubt that the defendant considered taking the life of Karen Ann Roberts, and reflected upon this matter coolly and fully before doing so, you must find the defendant not guilty of capital murder.

No. 7, 8 & 9, that they could find the defendant guilty of capital

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[9]Continued.....

Instruction No. 9

Evidence that the defendant had a mental disease or defect may be considered by you in determining whether the defendant had or did not have the state of mind required of capital murder and set out in Instruction 7 as an element of that offense.

If, after considering all of the evidence, including evidence that the defendant did or did not have a mental disease or defect, you find and believe from the evidence that the defendant engaged in the conduct submitted in Instruction No. 7 but have a reasonable doubt that he acted only after considering taking the life of Karen Ann Roberts and reflecting upon this matter coolly and fully before doing so, then you must find the defendant not guilty of the offense of capital murder as submitted in Instruction No. 7.

Instructions No. 25 and 26, patterned respectively after MAI-CR2d 15.44 and 2.32, were submitted during the penalty phase of defendant's trial:

Instruction No. 25

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 22, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Karen Roberts.

You may also consider

1. Whether the murder of Karen Roberts was committed while the defendant was under the influence of extreme mental or emotional disturbance.

2. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. The age of the defendant at the time of the offense. You may also consider whether the defendant had a mental disease or defect at the time of the murder of Karen Roberts.

You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

murder only if they found he considered taking the life of Karen Roberts and reflected upon the matter coolly and fully before doing so, and defendant's assertion of metal disease or defect was not diluted by the trial court's accurate statements of the law. During the penalty phase of defendant's trial, the jury was instructed by Instruction No. 25 to consider any extenuating or mitigating circumstances found from the evidence, including but not limited to whether he had a mental disease or defect at the time of Karen Roberts' murder. We fail to find error or the slightest unfairness in these instructions.

VII

Defendant contends that § 565.012.2(7), RSMo Cum. Supp. 1982, is so broad and vague in its wording, as well as its construction and application by this Court, as to violate the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 10 and 21 of the Missouri Constitution.

Section 565.012, RSMo Cum. Supp. 1982, provides:

> 1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:
>
> (1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence;

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[9]Continued.....

Instruction No. 26

> The phrase 'mental disease or defect,' as used in these instructions, means any mental abnormality, regardless of its medical label, origin or source except alcoholism without psychosis, except drug abuse without psychosis or except an abnormality manifested only by repeated anti-social conduct.
>
> In determining under other instructions given to you, whether the defendant had a mental disease or defect at the time of the commission of the offense charged against him and, if so, the extent and effect of it, the jury may take into consideration all of the facts, circumstances and opinions given in evidence. However, it is for the jury alone to decide this issue under the law as given to you in these instructions.

. . .

2. Statutory aggravating circumstances shall be limited to the following:

. . .

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

. . .

4. . . . The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

(Emphasis added.)

In Gregg v. Georgia, 428 U.S. 153 (1976), the United States Supreme Court upheld the facial validity of a provision substantively indistinguishable from § 565.012(7) against Eighth and Fourteenth Amendment challenges. As no authority is advanced for a different interpretation of Missouri's constitution, we see no reason to reconsider our rejections of defendant's claim in State v. Blair, 638 S.W.2d 739, 758 (Mo. banc 1982), and State v. Newlon, 627 S.W.2d 606, 621 (1982), cert. den. 103 S.Ct. 185 (1982).

In addition it has been held in Godfrey v. Georgia, 446 U.S. 420 (1980), that capital murder statutes must be construed in such a manner that the nature of a crime and all the circumstances justify imposition if the death penalty so as not to violate a defendant's rights to freedom from cruel and unusual punishment and to due process of law. In Godfrey, a death sentence based on the single aggravating circumstance that two murders were "outrageously or wantonly vile, horrible or inhumane in that [they] . . . involved . . . depravity of mind" was reversed when it could not be said the crimes "reflected a consciousness materially more 'depraved' than that of any person guilty of murder." 446 U.S. at 433. In this case, however, defendant's sentence was not predicated on a general

finding of depravity of mind. On the form in which defendant's punishment was fixed at death, the jury designated in a handwritten finding the following aggravating circumstance:

> The evidence showed to the jury unanimously and beyond a reasonable doubt that the defendant did torture Karen Ann Roberts by: shoving her down, then chasing her for two and one half blocks all the while holding an eight pound iron bar in his hand and then beat her repeatedly about the upper body and head, causing her death.
>
> We the jury also find that these actions were outrageously and wantonly vile, horrible and inhuman.

Clearly, there was evidence from which the jury could find beyond a reasonable doubt that defendant intended to cause the victim suffering before her death. In his letter to the St. Louis Globe Democrat, defendant said "I had a gun on me at the time but I thought shooting would be too damn good for her. I wanted her to feel some pain so I beat her little lousy head in." The question of whether the defendant caused Karen Ann Roberts to suffer before she died was a jury question, and the evidence was sufficient to submit the issue. The mounting terror and horrible anticipation of a grisly fate intentionally inflicted by defendant on Karen Roberts as he pursued her over a distance of two and one half blocks with what she knew was a heavy metal cudgel, together with his initial and repeated bludgeoning of her upper body and head is sufficient beyond a reasonable doubt to constitute an offense "outrageously or wantonly vile, horrible or inhuman in that it involved torture" and satisfy the requirement of Godfrey. We find § 565.012(7) was validly applied in this case.

VIII

We turn now to the statutorily mandated review of defendant's death sentence. § 565.014.

There is no allegation nor do we find evidence that Gerald Smith's death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor. The record factually

supports the verdict. As discussed in the preceding point, the evidence also supports the jury's finding of the statutory aggravating circumstance beyond a reasonable doubt and the sentence of death by a rational trier of fact. Considering the crime and the defendant, we have reviewed the records of the twenty-two capital cases in which death and life imprisonment have been submitted to the jury under the law effective May 26, 1977, in which the jury agreed on punishment and which have been decided on appeal. Here the record discloses that defendant (1) caused the death of Karen Roberts by (2) brutally beating her with an iron bar while (3) intending her to suffer, (4) causing her to suffer (5) cold-bloodedly planning the murder four months in advance and that (6) defendant is without remorse. The sentence of death is not disproportionate to the penalty imposed in similar cases, and the judgment is affirmed.

ALBERT L. RENDLEN, CHIEF JUSTICE

Date of execution set for June 10, 1983

Welliver, Higgins, Gunn, JJ., and Finch, Sr.J., concur; Seiler, Sr. J., concurs in separate opinion filed; Donnelly, J., dissents in separate opinion filed. Billings and Blackmar, JJ., not participating because not members of the Court when cause was submitted.

Supreme Court of Missouri

en banc

STATE OF MISSOURI,
Respondent,
vs.
GERALD SMITH,
Appellant.

No. 63338

CONCURRING OPINION

In deciding whether the death penalty in this case is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, § 565.014.3(3), RSMo 1978, the court again fails to state how or in what way this case differs from the many cases where the homicide was just as bad or worse, yet the jury elected life without parole for fifty years as punishment, not death. See the numerous cases set forth in No. 63569, State v. LaRette, handed down March 29, 1983, and State v. Newlon, 627 S.W. 2d 606, 628-633; Seiler, J., dissenting.

Never before has this court had the authority to reduce a sentence on the ground it is disproportionate. Because a life is at stake and because of its concern that there be no arbitrary imposition of the death penalty, the legislature has imposed this duty upon us. The principal opinion, however, says no more than that "we have reviewed the records of the twenty-two [other] capital cases in which death and life imprisonment have been submitted to the jury", without distinguishing any of them. All an observer learns from this is that to the values of the court there is nothing wrong with the death

sentence here. No similar case or cases are pointed out or relied upon. Nothing is said as to why this death sentence is not disproportionate to the penalty imposed in similar cases. What is lacking is a demonstration that similar cases are not punished in Missouri less severely than the offense before us.

No information is given as to how this death sentence compares with the values of the community as reflected by the verdicts of juries in similar cases. Juries selected from the community determine the sentence in these capital murder cases. It is proportionality as to what juries do with similar cases which the statute calls on us to evaluate. This, as I have attempted to illustrate on earlier occasions, we are failing to do. I do not approve of this, but under compulsion of State v. LaRette, supra, I concur in the affirmance of judgment.

Robert E. Seiler, Senior Judge

Supreme Court of Missouri

en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 63338
	)	
GERALD SMITH,	)	
	)	
Appellant.	)	

DISSENTING OPINION

In my view, this case comes within the Godfrey interdiction.

I respectfully dissent.

Robert T. Donnelly, Judge

APPENDIX C

CONSTITUTIONAL PROVISIONS

Constitution U.S., Amendment V:

Nor shall any person be deprived of life, liberty, or property without due process of law.

Constitution U.S., Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence.

Constitution U.S., Amendment VIII:

Nor shall cruel and unusual punishment be inflicted.

Constitution U.S., Amendment XIV, Section 1:

Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 565.012, R.S.Mo. Supp. 1982

Evidence to be considered in assessing punishment in capital murder cases

1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

> (1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence;...

2. Statutory aggravating circumstances shall be limited to the following:

> ***(7) The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, or depravity of mind;

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

Section 565.014, R.S.Mo. 1978

Supreme court to review all death sentences, notice, contents of--findings required--assistant to supreme court authorized, duties of

1. Whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court together with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

2. The supreme court of Missouri shal consider the punishment as well as any errors enumerated by way of appeal.

3. With regard to the sentence, the supreme court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

4. Both the defendant and the state shall have the right to submit briefs within the time provided by the supreme court, and to present oral argument to the supreme court.

5. The supreme court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Missouri in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

6. There shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital cases in which sentence was imposed after May 26, 1977, or such earlier date as the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant. The court shall be authorized to employ an appropriate staff, within the limits of appropriations made for that purpose, and such methods to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence. The office of the assistant to the supreme court shall be attached to the office of the clerk of the supreme court for administrative purposes.

7. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

IN THE

SUPREME COURT OF THE UNITED STATES

GERALD J. SMITH,
Petitioner

vs.

STATE OF MISSOURI,
Respondent

No.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Gerald J. Smith, who is now incarcerated in the Missouri State Penitentiary, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the United States without prepayment of cost and to proceed in forma pauperis. Leave was granted allowing petitioner to proceed in forma pauperis by the Circuit Court of St. Louis City and the Supreme Court of the State of Missouri. The petitioner's affidavit in support of this petition is attached hereto.

Respectfully submitted,

Mr. Richard H. Sindel
MO Bar # 23406
Attorney at Law
15-A Meramec Avenue
St. Louis, MO 63105

IN THE

SUPREME COURT OF THE UNITED STATES

GERALD J. SMITH, Petitioner	)	
vs.	)	
STATE OF MISSOURI, Respondent	)	No.

Affidavit in Support of Petition for Leave to Proceed in Forma Pauperis

I, Gerald J. Smith, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. Because of my poverty I am unable to pay the costs of said cause.

2. I am unable to give security for the same.

3. I believe that I am entitled to the redress I seek in said cause.

4. The nature of said cause is briefly stated as follows:

I was found guilty of capital murder and sentenced to death.

The judgment and sentence of the jury was affirmed by the Missouri Supreme Court on April 26, 1983. Several guarantees afforded by the United States Constitution under the 8th Amendment prohibiting cruel and unusual punishment

and the due process clause of the 14th Amendment were argued before the Missouri Supreme Court and I now seek redress from that court's ruling by application to this Court seeking a Writ of Certiorari.

Gerald J. Smith

Subscribed and sworn to before me, a notary public, on this 26th day of May, 1983

Pamela S. Joyce

My Commission expires:

PAMELA S. JOYCE
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES JAN. 7, 1985
ST. LOUIS COUNTY